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Article

Published Version

Schmitt, M. ORCID: <https://orcid.org/0000-0002-7373-9557> and Ford, C. (2017) Assessing U.S. justifications for using force in response to Syria's chemical attacks: an international law perspective. *Journal of National Security Law and Policy*, 9 (2). pp. 283-303. ISSN 1553-3158 Available at <https://centaur.reading.ac.uk/89691/>

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Published version at: <http://jnslp.com/2017/05/18/assessing-us-justifications-using-force-response-syrias-chemical-attacks-international-law-perspective/>

Publisher: University of the Pacific, McGeorge School of Law, and the Institute for National Security and Counterterrorism (INSCT) of the Maxwell School of Citizenship & Public Affairs and College of Law of Syracuse University.

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Assessing U.S. Justifications for Using Force in Response to Syria's Chemical Attacks: An International Law Perspective

Michael N. Schmitt* & Christopher M. Ford**

INTRODUCTION

On April 6, 2017, the United States launched an attack employing fifty-nine U.S. Navy Tomahawk Land Attack Missiles against the Al Shayrat airfield in response to Syria's use of chemical weapons against civilians two days earlier.¹ The cruise missile strikes constituted the most robust example of military intervention without United Nations Security Council approval on the basis of human suffering since the 1999 NATO bombing campaign to end abuse of the Kosovar Albanians by the Federal Republic of Yugoslavia.² They sparked an impassioned debate regarding the legality and legitimacy of the operation under both domestic and international law.³

This article examines the administration's statements justifying the operation. Although none of them was articulated in the patois of international law, we attempt to categorize and assess the explanations from that perspective. Three possible legal bases merit attention: self-defense, response to an internationally wrongful act, and humanitarian intervention. In our view, the U.S. actions run afoul of limitations resident in each body of law.

Of particular note is the last, for the operation had the feel of humanitarian intervention. Although long the subject of serious scholarship,⁴ the validity of

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1. Michael R. Gordon, Helene Cooper, and Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html>.

2. See INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT 94 (2000), <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>.

3. See e.g., Marty Lederman, *Why the Strikes Against Syria Probably Violate the U.N. Charter and (therefore) the U.S. Constitution*, JUST SECURITY (Apr. 6, 2017), <https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/>; Marko Milanovic, *The Clearly Illegal US Missile Strike in Syria*, EJIL: TALK! (Apr. 7, 2017), <https://www.ejiltalk.org/the-clearly-illegal-us-missile-strike-in-syria/>; Ashley Deeks, *How Does the Syrian Situation Stack up to the "Factors" that Justified Intervention in Kosovo?*, LAWFARE (Apr. 7, 2017, 8:28 AM), <https://lawfareblog.com/how-does-syria-situation-stack-the-factors-justified-intervention-kosovo>.

4. See e.g., Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Harold H. Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971 (2016); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FIN. Y.B. OF INT'L

humanitarian intervention as a basis for the lawful use of force on another State's territory without that State's consent or the imprimatur of the United Nations Security Council remains the subject of significant disagreement.⁵ The missile strikes not only raised the issue anew, but, in our view, were normatively consequential. They amounted to State practice that contributed to the crystallization of a customary law right to humanitarian intervention. Arguably, they also influenced the conditions precedent to the exercise of that purported right. We conclude our assessment by offering a tentative suggestion that the international community is likely to consider the *nature* of suffering, in addition to the *quantum* thereof, as bearing on the right of States to mount future humanitarian operations.

I. UNRAVELING THE U.S. JUSTIFICATIONS

The missile strikes into Syria targeted “aircraft, hardened aircraft shelters, petroleum and logistical storage, ammunition supply bunkers, air defense systems, and radars.”⁶ They followed a chemical weapons attack against civilians in Khan Sheikhoun, Syria that the United States concluded had been conducted by the Syrian armed forces, employing assets located at the airfield.⁷ Albeit horrific, and involving the use of a weapon that is universally condemned as unlawful *per se*, Syria's attack left fewer than one hundred civilians dead. The situation was not one of widespread human distress over an extended period, which usually foreshadows external intervention on humanitarian grounds. Nevertheless, the U.S. actions received broad support from the international community, while being condemned by only a few States.⁸

L. 141 (1999); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006). Our initial thoughts on the subject were set forth in Michael Schmitt & Chris Ford, *The Use of Force in Response to Syrian Chemical Attacks: Emergence of a New Norm?*, JUST SECURITY (Apr. 8, 2017, 12:43 PM) <https://www.justsecurity.org/39805/force-response-syrian-chemical-attacks-emergence-norm/>.

5. This question is not addressed by the Articles of State Responsibility. See Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at art. 25, commentary ¶ 21 (2001), reprinted in [2001] 2 Y.B. INT'L L. COMM. 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Articles on State Responsibility].

6. U.S. Dep't of Defense, Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. Strike in Syria, Release No. NR-126-17 (Apr. 6, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria/> [hereinafter Davis Statement].

7. *Id.*

8. Countries expressly supporting the U.S. action include the United Kingdom, Germany, France, Turkey, Israel, Saudi Arabia, Australia, Italy, Poland, the U.A.E., Japan, and Canada. Countries opposing the action include Syria, Russia, Iran, and Bolivia. Gregor Aisch, Yonette Joseph & Anjali Singhvi, *What Countries Support and Which Oppose the U.S. Missile Strikes in Syria*, N.Y. TIMES (Apr. 9, 2017), <https://www.nytimes.com/interactive/2017/04/07/world/middleeast/world-reactions-syria-strike.html>.

After the operation, senior U.S. officials offered varying justifications for taking the action.⁹ We have grouped their statements based on the possible underlying legal basis. This is to an extent an artificial construct, for the administration has not publicly offered a definitive explanation of the legal grounds for the U.S. use of force.¹⁰ Accordingly, the categories are merely a heuristic to organize the legal analysis. Indeed, some statements can be classified under more than one category.

The first group of statements invoke the notion of “preventative action” to stop the spread of chemical weapons. Notably, the President issued a statement that referenced the need to protect the “vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.”¹¹ Secretary of State Rex Tillerson echoed the President’s comments, defending the strikes as part of an effort to prevent chemical weapons from “falling into the hands” of “elements that are plotting to reach our shore,”¹² while Secretary of Defence James Mattis spoke of a need to “deter future use of chemical weapons.”¹³ The DoD spokesperson declared that the strikes were “intended to deter the regime from using chemical weapons again”¹⁴ and White House Press Secretary Sean Spicer indicated the operation was intended “to stop the proliferation and the deterrence [sic] of chemical weapons.”¹⁵ National Security Advisor H.R. McMaster likewise emphasized the goal of deterring their later use.¹⁶

9. See Kate Brannen, *Tracking the White House's Reasons for Bombing Syria*, JUST SECURITY (Apr. 11, 2017, 12:16 PM), <https://www.justsecurity.org/39864/track-white-houses-reasons-striking-syria/>.

10. Compare Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strikes*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/world/middleeast/syria-united-protect-democracy-trump-lawsuit.html> with Caroline D. Krass, Memorandum Opinion for the Attorney General: Authority to Use Military Force in Libya (Apr. 1, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (providing the legal basis for the use of force in Libya). https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (providing the legal basis for the use of force in Libya).

11. Donald J. Trump, U.S. President (Apr. 6, 2017) in N.Y. TIMES, *Transcript and Video: Trump Speaks about Strikes in Syria* (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/transcript-video-trump-airstrikes-syria.html>.

12. Rex W. Tillerson, U.S. Sec’y of State, Remarks with National Security Advisor H.R. McMaster, (Apr. 6, 2017), <https://www.state.gov/secretary/remarks/2017/04/269543.htm> [hereinafter Tillerson Remarks].

13. James Mattis, U.S. Sec’y of Defense, Statement by Secretary of Defense Jim Mattis on the U.S. Military Response to the Syrian Government’s Use of Chemical Weapons (Apr. 10, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1146758/statement-by-secretary-of-defense-jim-mattis-on-the-us-military-response-to-the/>.

14. Davis Statement, *supra* note 6.

15. Erik Wemple, *The Daily Spicer: Press Secretary Discusses Policy Toward “Bissaa al-Ashar”*, WASH. POST (Apr. 10, 2017), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/04/10/the-daily-spicer-press-secretary-hatches-new-war-acronym-mwd/>.

16. Interview by Chris Wallace with H.R. McMaster, U.S. Nat. Sec. Advisor, FOX NEWS (Apr. 9, 2017), <http://www.foxnews.com/transcript/2017/04/09/exclusive-general-h-r-mcmaster-on-decision-to-strike-syria.html> [hereinafter McMaster Interview].

A second group of statements alluded to Syria's breach of its international obligations. The U.S. Ambassador to the U.N., Nikki Haley, pointed to Syria's "violation of the Chemical Weapons Convention" and "a violation of the U.N. Security Council resolutions,"¹⁷ while Tillerson used similar language, indicating that the President "is willing to act when governments and actors "cross the line on violating commitments they've made."¹⁸

The final group of statements highlighted the humanitarian aspects of the operation. Haley remarked that "I can tell you that [the President's] focus was on the fact that innocent victims were hurt."¹⁹ In initial remarks to reporters, Spicer similarly noted, "there's a huge humanitarian component to this."²⁰ A few days later, he commented, "when you watch babies and children being gassed and suffer under barrel bombs, you are instantaneously moved to action."²¹ Deputy Assistant to the President Sebastian Gorka argued, "when evil happens and you are able to do something about it, you do something about it."²² Finally, McMaster referenced "mass murder attacks against innocent civilians."²³

These statements evidence the underlying impetus for the missile strikes, but they fail to set forth the administration's legal basis with either perspicuity, granularity, or transparency. If a formal legal analysis was conducted, as it presumably was, the resulting legal opinion has not been officially released. Rather, a document entitled "Basis for Using Force" that reportedly circulated within the government became public, but unfortunately, like the aforementioned statements, merely presented a series of quasi-legal arguments that shed little light on the matter.²⁴

Nevertheless, the groups of statements can be thought of as loosely invoking three legal bases for the operations. Those focusing on prevention imply justification based upon the self-defense exception to the prohibition on the use of force. Statements referring to violations of international law may be viewed from the perspective of the law of State responsibility. Finally, statements referencing suffering suggest the humanitarian intervention exception, if any, to

17. Olivia Beavers, *Haley: Attack on Syria "One of the President's Finest Hours,"* The Hill, Apr. 9, 2017.

18. Tillerson Remarks, *supra* note 12.

19. Angela Dewan, *US Envoy Nikki Haley say Syria Regime Change is Inevitable*, CNN, Apr. 10, 2017.

20. Sean Spicer, White House Press Sec'y, Press Gaggle (Apr. 7, 2017) (transcript available at <https://www.whitehouse.gov/the-press-office/2017/04/07/press-gaggle-press-secretary-sean-spicer>).

21. John T. Bennett, *After Syria Strike, Trump Administration Talks Tough*, Roll Call, Apr. 17, 2017.

22. Laura Ingram & Sebastian Gorka, DR. SEBASTIAN GORKA INTERVIEW ON THE LAURA INGRAHAM SHOW LAURA INGRAM SHOW (Apr. 7, 2017).

23. McMaster Interview, *supra* note 16.

24. *Basis for Using Force, (Apparent) Administration Justifications for Legality of Strikes Against Syria*, JUST SECURITY (Apr. 8, 2017), <https://www.justsecurity.org/39803/apparent-administration-justifications-legality-strikes-syria/>. New York Times reporter Charlie Savage described the document as unsigned talking points. Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strikes*, N.Y. TIMES (May 8, 2017) [hereinafter *Basis for Using Force*].

the prohibition on the use of force. The legal analysis that follows is organized around these three normative strands that “preclude the wrongfulness” of a State’s resort to force under international law.²⁵

II. ASSESSING THE U.S. JUSTIFICATIONS

Before assessing the U.S. justifications from a legal point of view, it is useful to dispense with one red herring, the *jus in bello* issue of commencement of an armed conflict under international humanitarian law. Clearly, the United States and Syria are involved in an international armed conflict because the former engaged in hostilities against the armed forces of the latter; it will continue until there is a prolonged cessation of hostilities.²⁶ This conclusion is in accord with both the ICRC²⁷ and DoD²⁸ interpretations of when such conflicts are triggered and end. Existence of the conflict is of no consequence for the purposes of this article, for conflict classification does not bear on the legality of the use of force under the *jus ad bellum*.

As to the *jus ad bellum*, a military strike by one State targeting the forces of another is the paradigmatic example of a violation of Article 2(4) of the U.N. Charter, which prohibits the “threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”²⁹ This provision reflects custom-

25. For the grounds for precluding wrongfulness of a State’s action or omission, see Articles on State Responsibility, *supra* note 5, pt. 1, ch. V.

26. This temporal conclusion precludes what trial chamber in *Gotovina* referred to as a “revolving door between applicability and nonapplicability.” Prosecutor v. Gotovina and Marc, Case No. IT-06-90-T, Judgment, ¶ 1694 (Int’l Crim. Trib. for the former Yugoslavia Apr. 15, 2011). See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 75 U.N.T.S. 287 (“the application of the present Convention shall cease on the general close of military operations.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3 June 8, 1977, 1125 U.N.T.S. 3 (“the application of the Conventions and of this Protocol shall cease . . . on the general close of military operations, and, in the case of occupied territories, on the termination of the occupation . . .”).

27. The International Committee of the Red Cross (ICRC) commentaries to the 1949 Geneva Conventions make clear that an international armed conflict exists whenever there are hostilities between States. This is so irrespective of “how long the conflict lasts, or how much slaughter takes place.” *E.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32 (2d ed., 2016).

28. OFFICE OF THE GENERAL COUNSEL, U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 3.4.2 (2016) [hereinafter DoD Manual] (quoting U.S. Dep’t of State to American Embassy at Damascus, Telegram 348126, Dec. 8, 1983, in 3 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 3456, 3457 (1981-1988 eds.) (the United States considers an armed conflict to exist in “any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting.”); *id.* § 3.8.1.2 (2016) (“Hostilities generally would not be deemed to have ceased without an agreement, unless the conditions clearly indicate that they are not be resumed or there has been a lapse of time indicating the improbability of resumption.”).

29. U.N. Charter art. 2(4).

ary international law and is considered a *jus cogens* norm.³⁰ There are two U.N. Charter-based exceptions to the prohibition: Security Council authorization or mandate under Chapter VII and self-defense pursuant to Article 51 (and customary international law).³¹ Consent is a universally accepted extra-charter basis for the use of force on another State's territory, although it is improbable a State would consent to the use of force against its own military.³² Unsettled customary law exceptions to the prohibition on the use of force may include forcible countermeasures, the plea of necessity, and humanitarian intervention.

With respect to the Syria case, there has been no Security Council authorization or mandate for the use of force in response to the chemical weapons attack and Syria self-evidently did not consent to the attack on its facilities.³³ This leaves self-defense, countermeasures, necessity, and humanitarian intervention.

A. Preventive Action: Self-Defense

Recall that the President, Secretary of Defense, White House Press Secretary, and National Security Advisor raised the issues of deterrence to prevent the future use of chemical weapons by Syria (and presumably other States) and counter-proliferation. These statements accordingly suggest a self-defense justification for the missile strikes, albeit one expressed in the vernacular of prevention, rather than as a response to an ongoing or imminent attack.

The modern law of self-defense finds its origins in Daniel Webster's correspondence in the *Caroline* case, in which he opined that there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" before resorting to force, and that said use must not be "unreasonable or excessive."³⁴ This construction has since been interpreted as articulating the customary law requirements for self-defense, which today exist alongside with Article 51 of the U.N. Charter.³⁵ Article 51 provides that States have an "inherent right of individual or collective self-defense if an armed

30. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.), Judgment, 1986 ICJ Rep. 14, ¶¶ 187-191 (June 27) [hereinafter *Nicaragua*]. See also *Articles on the Law of Treaties with Commentaries*, art. 53, commentary ¶ 1 [1966] 2 YB INT'L L. COMM. 187.

31. U.N. Charter arts. 42 and 51, respectively. On the customary law nature of the self-defense exception, see *Nicaragua*, *supra* note 30, ¶ 176.

32. See Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings) *Report*, U.N. Doc. A/HRC/14/24/Add.6, ¶ 35 (May 28, 2010). On consent as a ground precluding the wrongfulness of an act, see *Articles on State Responsibility*, *supra* note 5, art. 20.

33. Permanent Representative of the Syrian Arab Republic to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/719 (Sept. 21, 2015), Permanent Representative of the Syrian Arab Republic to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/727 (Sept. 22, 2015).

34. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1840-1).

35. *Nicaragua*, *supra* note 30, ¶ 176 (customary international law on self-defense "continues to exist alongside treaty law").

attack occurs.”³⁶ The International Court of Justice has confirmed that self-defense must be necessary and proportionate.³⁷

Self-defense may be individual (national) or collective. With respect to the former, for example, the United States has asserted a right of individual self-defense against “*al-Qaida* elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.”³⁸ Individual self-defense is not a viable basis for the use of force in the instant case since Syria’s chemical weapons attack was not directed at the United States. As to the latter, collective defense may only be conducted at the request and on behalf of another State that is facing an armed attack.³⁹ The U.S. operations against ISIS in Iraq and Syria, for example, are being taken in the collective defense of Iraq.⁴⁰ Syria, by contrast, used chemical weapons against its own citizens, not another State. Since no other State was the subject of an armed attack, there was obviously no request in fact or law to the United States for collective defense.

U.S. officials discussing the missile strikes seem, however, to be alluding to a right of “preventative” self-defense. There is a longstanding debate over whether States enjoy the right to use defensive force before the underlying armed attack is launched.⁴¹ The prevailing understanding is that they may act to preempt an “imminent” attack.⁴² Such an action has traditionally been branded “anticipatory self-defense” in international law.

To the extent there exists a right to anticipatory self-defense, there are limits.⁴³ In our view, international law requires that the State that will supposedly launch the armed attack have the capability and intent to conduct an armed attack. It also limits the taking of defensive action to the last window of

36. U.N. Charter art. 51.

37. Nicaragua, *supra* note 30, ¶ 94; Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 43 (Nov. 6).

38. Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

39. Nicaragua, *supra* note 30, ¶ 199.

40. Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

41. Terry D. Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy*, in INTERNATIONAL LAW AND ARMED CONFLICTS: EXPLORING THE FAULTLINES 113 (Michael N. Schmitt and Jelena Pejic eds., 2007).

42. See, e.g., DoD Manual, *supra* note 28, § 1.11.5.1 (“Under customary international law, States had, and continue to have, the right to take measures in response to imminent attacks.”); Lord Peter Henry Goldsmith, Attorney General, Oral Answers to Questions, 660 Parl Deb HC (6th ser.) (2004) 370-71 (UK) (“it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent.”).

43. See, e.g., YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 233 (5th ed. 2011); Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 2 AM. J. OF INT’L L. 106 (2012).

opportunity available to effectively defend oneself.⁴⁴ In this case, there is no evidence to suggest that Syria intended to launch chemical weapons, or any other weapons for that matter, against either its neighbors or the United States (including U.S. forces in the region) in the future. In the absence of a reasonable conclusion that Syria harbors such an intent, the purported defensive action is purely preventive in nature.⁴⁵ Such operations are unlawful. International law only countenances the use of force, even defensive force, as an option of last resort in the face of an attack that is almost surely going to manifest. Deterrence and counter-proliferation are not grounds for employing force against another State.

There is accordingly no basis for relying on the law of self-defense to justify the U.S. missile strikes. This is so with respect to both individual and collective defense, and includes actions that might be characterized as anticipatory.

B. Breach of International Law Obligations: State Responsibility

The second group of statements indicate the U.S. missile strikes were in part a response to Syria's failure to abide by its international legal obligations regarding chemical weapons. This raises the issues of internationally wrongful acts and the appropriate responses thereto under the law of State responsibility. In particular, it must be determined whether Syria's use of chemical weapons violated any obligation it owed the United States or another State and, if so, whether forceful countermeasures or the use of force based on the plea of necessity were permissible.

1. Countermeasures

The use of chemical weapons is irrefutably banned. Such use is prohibited in the first instance by the 1925 Geneva Gas Protocol⁴⁶ and the Chemical Weapons Convention.⁴⁷ Syria is Party to both instruments, as is the United States. This being so, Syria's use of them was an "internationally wrongful act," for it breached a legal obligation owed the other Parties to the treaties.⁴⁸ Since they do not address the use of force or other remedial measures designed to enforce their provisions, any responses by States Parties to a breach is left to the realm of the law of State responsibility.

44. Michael N. Schmitt, *Pre-Emptive Strategies in International Law*, 24 MICH. J. OF INT'L L. 513, 546 (2003).

45. Oil Platforms, *supra* note 37, ¶ 64. See also Elizabeth Wilmshurst, *Principles of International Law on the Use of Force in Self-Defence* 5 (Oct. 2005), <https://www.chathamhouse.org/publications/papers/view/108106>. But cf William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 302 (2004).

46. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

47. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

48. Articles on State Responsibility, *supra* note 5, arts. 1-2.

The prohibition on the use of chemical weapons is also universally accepted as customary international law.⁴⁹ This raises the issue of to whom the obligation to refrain from their use is owed. In *Barcelona Traction*, the International Court of Justice (ICJ) confirmed the existence of obligations *erga omnes*, which are obligations owed to the entire international community.⁵⁰ The International Law Commission's non-binding but authoritative Articles on State Responsibility endorse the concept of obligations *erga omnes*,⁵¹ according to which "every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfillment of certain essential obligations."⁵²

It must consequently be determined whether the use of chemical weapons violates an obligation *erga omnes*. The International Criminal Tribunal for the Former Yugoslavia has characterized obligations *erga omnes* as deriving from the "outlawing of acts of aggression, and of genocide, [and] also from the principles and rules concerning the basic rights of the human person."⁵³ It is reasonable to contend that, given the universally accepted and long-standing ban on the use of chemical weapons in any circumstance, a duty to refrain from their use against civilians qualifies as such an obligation. Assuming, *arguendo*, that the prohibition on the use of a chemical weapons is an obligation *erga omnes*, Syria has breached a customary international law obligation owed to all States.

States to whom a breached treaty or customary law obligation is owed are entitled to various remedies under international law. These include the right to demand cessation, seek assurances and guarantees of non-repetition, receive reparations, and take countermeasures.⁵⁴ In the instant case, countermeasures are the most relevant. Countermeasures are acts (which include both actions and omissions) that would otherwise be unlawful but for the fact that they are taken to "ensure the cessation of the wrongful act and reparation for its consequences."⁵⁵ There are two obstacles to styling the U.S. missile strikes as a countermeasure.

First, it is uncertain whether countermeasures may include actions at the use of force level. The Articles on State Responsibility take the position that they

49. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY 259 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); DoD Manual, *supra* note 28, § 6.8.2. *See also* Rome Statute of the International Criminal Court art. 8(2)(b)(xviii), July 17, 1998, 2187 U.N.T.S. 90 (confirming that the use of chemical weapons is also a war crime in customary international law).

50. *See Case Concerning the Barcelona Traction (Spain v. Belg.)*, Judgment, 1970 ICJ 3, ¶ 33 (Feb. 5).

51. *See* Articles of State Responsibility, *supra* note 5, arts. 33, 42(b).

52. *Id.*, art. 1, commentary ¶ 4.

53. *Barcelona Traction*, 1970 I.C.J. at ¶ 34.

54. Articles on State Responsibility, *supra* note 5, arts. 22, 29-31.

55. *Id.*, General Commentary, ¶ 6.

are limited to non-forcible actions.⁵⁶ A contrary position, expressed most lucidly by Judge Simma in his separate opinion in the *Oil Platforms* judgement, is that forcible countermeasures might be appropriate so long as the acts comprising them do not rise to the level of an “armed attack” as contemplated in the law of self-defense.⁵⁷ The merits of this position need not be addressed, however, as an operation involving the use of 59 cruise missiles clearly exceeds the armed attack threshold. Thus, the operation cannot be justified as a countermeasure.

Second, under the law of State responsibility, a State is entitled to invoke the responsibility of another State, in this case Syria, if the obligation is owed to a group of States of which both are members. All States may do so in the case of obligations *erga omnes*.⁵⁸ Yet, the chemical weapons were used solely against Syrian civilians. No other State suffered harm because of the Syrian violation of the treaties and the possible obligation *erga omnes* prohibiting the use of chemical weapons. It is unclear in international law whether States in these circumstances are entitled to take countermeasures, even if the missile strikes had otherwise qualified as such.⁵⁹ They may arguably only demand cessation, assurances, and guarantees.⁶⁰

Note that in addition to treaty and customary law, Syria is also in breach of Security Council Resolution 2118, adopted after Syria’s first use of chemical weapons on August 21, 2013.⁶¹ That resolution endorsed the Framework for the Elimination of Syrian Chemical Weapons adopted by the Organization for the Prohibition of Chemical Weapons.⁶² Yet, neither Resolution 2118 nor the Framework envision the use of force by individual States in response to a Syrian breach. Since the Security Council has not authorized or mandated such action, violation of the resolution provides no basis for the U.S. missile strikes. On the contrary, on February 28, 2017, Russia and China vetoed Security Council Draft Resolution 172, which would have authorized a resort to force in response to the use of chemical weapons.⁶³ This was the seventh and sixth veto respectively for Russia and China on matters related to Syria.⁶⁴

56. *Id.* at art. 50(1)(a). *See also* Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, United Nations Convention on the Law of the Sea (*Guy. v. Surin.*), Award, ¶ 466 (Perm. Ct. Arb. 2007).

57. *Oil Platforms*, *supra* note 37, at ¶¶ 13-16 (separate opinion by Judge Simma).

58. Articles on State Responsibility, *supra* note 5, art. 48(1)(b).

59. *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, r. 24., commentary ¶ 5 (Michael N. Schmitt ed., 2017) [hereinafter Tallinn Manual].

60. *See* Articles on State Responsibility, *supra* note 5, at art. 48(2)(a).

61. *See* S.C. Res. 2118 (Sept. 27, 2013).

62. *Id.* at 2 (citing G.A. Res. A/68/398-S/2013/565 (Sept. 24, 2013)).

63. *See* U.N. Doc. S/2017/172 (Feb. 28, 2017).

64. U.N. Doc. S/2016/1026 (Dec. 5, 2016); U.N. Doc. S/2016/846 (Oct. 8, 2016); U.N. Doc. S/2014/348 (May 22, 2014); U.N. Doc. S/2012/538 (Jul. 19, 2012); U.N. Doc. S/2012/77 (Feb. 4, 2012); U.N. Doc. S/2011/612 (Oct. 4, 2011).

2. Plea of Necessity

A second ground for taking measures that would otherwise be unlawful is the plea of necessity. There have been suggestions that perhaps the plea may provide a ground for the preclusion of the wrongfulness of the U.S. use of force under the law of State responsibility.⁶⁵ We disagree.

The plea allows States to respond to situations that present a “grave and imminent” danger to their “essential interests” by means of an otherwise internationally wrongful act(s) if doing so is the sole means of safeguarding those interests.⁶⁶ Recently, an international group of experts considered whether the interests of the international community as a whole, which might manifest in the event of the use of chemical weapons, qualify as an essential interest for the purposes of the plea. Most of them agreed, rightly in our view, that only the interests of States that are facing the danger so qualify.⁶⁷ By this interpretation, States other than Syria cannot resort to the plea to justify forceful action designed to end the use of chemical weapons on Syrian soil. Moreover, even these experts were divided as to whether forceful responses based on the plea are lawful in the first place.⁶⁸

It may be concluded, then, that although the Syrian chemical attacks were, as certain administration officials correctly noted, violations of international law, that fact did not alone justify the use of force against Syria.

C. Human Suffering: Humanitarian Intervention

The third cohort of administration statements invoked humanitarian considerations, albeit without citing humanitarian intervention as an explicit legal basis for the missile strikes. Nevertheless, humanitarian intervention is the only possible legal basis for using force to terminate humanitarian excesses without the authorization or mandate of the Security Council under Chapter VII of the U.N. Charter. As noted, the existence of such a right is an unsettled matter among States and international law scholars.

Conceptually, humanitarian intervention can be traced to the Just War tradition. Grotius argued that nations that “provoke their people to despair and resistance by unheard of cruelties” forfeit “the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.”⁶⁹ By the nineteenth century, the doctrine enjoyed widespread, but not universal, support.⁷⁰ For

65. Koh, *supra* note 4, at 1010-1012.

66. Articles on State Responsibility, *supra* note 5, art. 25.

67. See Tallinn Manual, *supra* note 59, at r. 26, commentary ¶ 3.

68. *Id.*, r. 26, commentary ¶ 18.

69. GROTIUS, *DE JURE BELLI*, Book II, ch. XXV, 8 (1625). See also EMER DE Vattel, *THE LAW OF NATIONS*, vol. 2, ch. IV, ¶¶ 55-56 (1758).

70. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338 (1963). But cf HENRY G. HODGES, *THE DOCTRINE OF INTERVENTION* 87 (1915) (“[a]s regards an intervention taken in the *cause of humanity* there seems to be a divergence of opinion among the most prominent writers . . .”) (alteration in original).

instance, examples of force being used, ostensibly on humanitarian grounds, include Great Britain, France, and Russia in Greece (1827); France in Syria (1860); Austria, Great Britain, France, Prussia and Russia in the Mount Lebanon Civil War (1860); Russia in Bosnia-Herzegovina and Bulgaria (1877); the United States in Cuba (1898); and Greece, Bulgaria, and Serbia in Macedonia (1903, 1912).⁷¹

Some commentators question the humanitarian basis of those interventions. For example, in 1963 Ian Brownlie suggested that “state practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the possible exception of Syria in 1860 and 1861.”⁷² Indeed, by the twentieth century, most support for the premise that States may take military action in other States on humanitarian grounds had trailed off.⁷³

Despite codification of key *jus ad bellum* principles in the U.N. Charter, the matter has not been settled. There is a general sense that a customary international law norm allowing humanitarian intervention in limited circumstances might be slowly emerging⁷⁴ and several prominent commentators have endorsed the concept.⁷⁵ Yet, crystallization of a customary law ground precluding the wrongfulness of an action (here the use of force) requires rather conclusive State practice and *opinio juris*.⁷⁶

71. J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 45 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003).

72. BROWNLIE, *supra* note 70, at 340.

73. A notable exception in this regard were the views of renowned international law scholar Sir Hersch Lauterpacht. *Id.* at 341 (citing HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 46 (1945)).

74. See Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 23 (1999); Adam Roberts, *NATO's Humanitarian War over Kosovo*, 41 SURVIVAL 102, 120 (Aug. 1999) (NATO operations in Kosovo may be a “halting step in a developing but still contested practice of using force in defence of international norms.”); Ruth Wedgwood, *Editorial Comments: NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 834 (Oct. 1999) (“At the same time, it is important to acknowledge that the Kosovo intervention may represent a sea change in the responsibility of multilateral organizations to attempt to thwart ethnic slaughter . . .”).

75. See Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! (Sept. 12, 2013), <https://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>; Koh, *supra* note 4; Christopher Greenwood, *Memorandum Submitted by Christopher Greenwood to the Select Committee on Foreign Affairs* (May 11, 2000), <https://www.publications.parliament.uk/pa/cm199900/cmselect/cmfa/28/0020802.htm>; Thomas M. Franck, *Humanitarian and Other Interventions*, 43 COLUM. J. TRANSNAT'L L. 321, 326-27 (2005) (Referencing humanitarian intervention, Franck writes, “[t]o use a simile coined by Simon Chesterman, the problem is to distinguish between the rare instances in which vigilante justice is the last hope of the victim in distress from those in which every gunslinger seeks to be empowered by a sheriff's badge. The answer must be found in devising a process for separating the sheep of socially-justified non-compliance from the goats of self-interested law-breaking.”).

76. See *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, Judgment, 1969 I.C.J. Rep. 3, ¶¶ 70-74 (Feb. 20). See also HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 61 (1970) (“International law custom signifies constant and uniform practice followed by States as a matter of obligation.”).

State expressions of support for the right of humanitarian intervention are sparse. The most significant and explicit expression of such *opinio juris* is that cited above, the UK Prime Minister's Office's policy paper issued following the use of chemical weapons in Eastern Damascus on August 21, 2013.⁷⁷ The paper unequivocally asserts the lawfulness of humanitarian intervention "in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime."⁷⁸ Furthermore, in January 2014, the Minister of State, Sir Hugh Robertson, affirmed the United Kingdom's acceptance of humanitarian intervention as a basis for the use of force.⁷⁹ Although the United Kingdom did not reference humanitarian intervention in its November 2014 notice to the Security Council with respect to the UK's use of force in Syria,⁸⁰ the Attorney General later confirmed the UK's support of a right to intervene on humanitarian grounds in a January 2017 speech at the International Institute for Strategic Studies.⁸¹

The United Kingdom's position regarding Syria is in keeping with statements made following the 1999 NATO operations in the Federal Republic of Yugoslavia. In debate at the Security Council, it noted that the military action regarding Kosovo "is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe."⁸² In the same proceedings, the Dutch ambassador remarked "we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation, we will act on the legal basis we have available."⁸³ Belgium subsequently argued before the International Court of Justice that the NATO action was "an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State."⁸⁴

77. See Statement, Office of the Prime Minister, Chemical Weapon Use by Syrian Regime: UK Government Legal Position (Aug. 29, 2013) [hereinafter P.M. Office Statement] <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>.

78. *Id.*

79. See Letter from the Rt. Hon. Hugh Robertson MP, U.K. Minister of State, Foreign & Commonwealth Office, to the Rt. Hon. Sir Richard Ottaway MP, U.K. House of Commons (Jan. 14, 2014) [hereinafter Robertson Letter] <https://www.justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf>.

80. U.N. Doc. S/2014/851 (Nov. 26, 2014) (the UK noted that it was "taking measures in support of the collective self-defence of Iraq."); see Statement to Parliament about Iraq: Coalition Against ISIL, Prime Minister David Cameron (Sept. 26, 2014) <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140926/debtext/140926-0001.htm#1409266000252>).

81. See Jeremy Wright, Attorney General, Speech at the International Institute for Strategic Studies: The Modern Law of Self-Defence 6 (Jan. 11, 2017) (transcript available at <https://www.justsecurity.org/wp-content/uploads/2017/01/United-Kingdom-Attorney-General-Speech-modern-law-of-self-defense-IISS.pdf>).

82. U.N. SCOR, 54th Sess., 3988th mtg. at 8, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

83. Statement of Peter van Walsum U.N. SCOR, 54th Sess., 3988th mtg. at 8, U.N. Doc. S/PV.3988.

84. Legality of Use of Force (Yugo. v. Belg.), Oral Pleadings of Belgium, 1999 I.C.J. Pleadings 12 (May 10, 1999, 3:00 PM).

The U.N. Security Council has sometimes approved humanitarian interventions after their launch. Such approval would logically be inconsistent with the unlawfulness of the operations *ab initio*. For example, in August 1990, the Economic Community of West African States (ECOWAS) intervened militarily in Liberia in the face of a humanitarian crisis.⁸⁵ According to the ECOWAS committee charged with addressing the conflict, “there is a government in Liberia which cannot govern and contending factions which are holding the entire population as hostage, depriving them of food, health facilities and other basic necessities of life.”⁸⁶ Although the President of Liberia, Samuel Doe, had requested ECOWAS intervention,⁸⁷ at the time he was “trapped within the executive mansion” and exercised no control over the country; thus, he was arguably no longer functioning as the leader of the Liberian government.⁸⁸ In any event, ECOWAS’ actions, which were not authorized by the U.N. Security Council, did not conform to Doe’s request.⁸⁹ The President of the Security Council nevertheless issued a statement in January 1991 commending “the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia.”⁹⁰

Similarly, the sectarian and tribal conflict that was precipitated by the ouster of Somalia’s President, Siad Barre, in 1991 led to a humanitarian catastrophe.⁹¹ Humanitarian assistance missions were launched into the country, including Operation Provide Relief in August of the following year. Provide Relief was supported by elements of the U.S. Army 5th Special Forces Group.⁹² Despite some U.N. coordination with the Somali *Charge D’Affaires*, Somalia did not consent to the U.S. and international actions.⁹³ Additionally, the Security Council expressly authorized the use of force under Chapter VII only in December.⁹⁴ Yet, several Security Council resolutions passed after Operation Provide Relief commended States for providing humanitarian assistance.⁹⁵

In 1997, ECOWAS intervened militarily in Sierra Leone by overthrowing a rebel junta and restoring the democratically elected government. ECOWAS’

85. Comfort Ero, *ECOWAS and the Subregional Peacekeeping in Liberia*, J. OF HUMAN. ASSISTANCE (Sept. 25, 1995) [hereinafter Ero], <https://sites.tufts.edu/jha/archives/66>.

86. ECOWAS Standing Mediation Committee, Banjul, Republic of Gambia, Final Communiqué of the First Session, 7 August 1990, Document 54, *quoted in* Comfort Ero, *supra* note 85.

87. Ero, *supra* note 85.

88. *Id.*

89. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 156 (2002).

90. S.C. Pres. Note S/22133 (Jan. 22, 1991).

91. RICHARD W. STEWART, U.S. DEP’T OF DEF., THE UNITED STATES ARMY IN SOMALIA 1992-1994, at 6 (1994).

92. *Id.* at 8.

93. Somalia, UNOSOM I Background Rep., <http://www.un.org/en/peacekeeping/missions/past/unosom1backgr2.html> (“Somalia remained without a central government with which to negotiate Several of the Somali de facto authorities refused to agree to the deployment of United Nations troops to secure delivery of aid in areas of greatest need.”).

94. S.C. Res. 794, ¶ 11 (Dec. 3, 1992).

95. *Id.*; S.C. Res. 746 (Mar. 17, 1992); S.C. Res. 767 (July 24, 1992); S.C. Res. 775 (Aug. 28, 1992).

actions plainly went beyond any authority granted by then-existing Security Council resolutions.⁹⁶ Still, a subsequent Security Council Resolution expressed “strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone”⁹⁷

More recently, France’s 2013 use of force in Mali exemplifies *post hoc* Security Council endorsement. The French Foreign Minister asserted that the use of force came in response “to a formal request by the Malian President and is being conducted in accordance with the UN Charter, in compliance with UNSCRs 2056, 2071 and 2085.”⁹⁸ The claim of consent merits examination. At the time of the operation, there was a “de facto partition of Mali between the Islamists in the north and the Malian government in the south”⁹⁹ The interim President of the south provided the consent.¹⁰⁰ As with President’s Doe’s request for ECOWAS intervention in Liberia, it is not altogether clear that he exercised the “effective control” of the State that was necessary under international law to have had the authority to consent to France’s use of force.¹⁰¹ And with respect to the cited resolutions, none included an authorization for the use of force.¹⁰²

Despite the questionable nature of the purported consent and the lack of Security Council authorization, numerous countries, including Belgium, Denmark, Germany, United Kingdom, and United States, provided logistical support to the operation.¹⁰³ For its part, the Security Council “[w]elcom[ed] the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali.”¹⁰⁴

Before launching the missile strikes against Syria, the United States had participated in only a few humanitarian interventions, the most notable being Operation Provide Comfort in Iraq, which began in 1991, and NATO’s 1999 bombing campaign in the Federal Republic of Yugoslavia. The former was a response to Iraq’s brutal suppression of the Kurds in northern Turkey after they revolted against Saddam Hussein’s regime following the first Gulf War. Thousands fled into the mountains of northern Iraq and southeastern Turkey to

96. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 227 (2000).

97. S.C. Res. 1132 (Oct. 8, 1997).

98. M. Laurent Fabius, French Foreign Minister, Press Conference (Jan. 14, 2013), <http://reliefweb.int/report/mali/press-conference-given-m-laurent-fabius-minister-foreign-affairs-january-14-2013>.

99. MICHAEL SHURKIN, RAND CORP., *FRANCE’S WAR IN MALI: LESSONS FOR AN EXPEDITIONARY ARMY* 7 (2014).

100. Edward Cody, *France’s Hollande Sends Troops to Mali*, WASH. POST (Jan. 11, 2013), https://www.washingtonpost.com/world/africa/frances-hollande-sends-troops-to-mali/2013/01/11/21be77ae-5c0f-11e2-9fa9-5fbdc9530eb9_story.html?utm_term=.0da3ddf4e392.

101. A government represents the State as long as it is in “effective control of that state.” RESTATEMENT (THIRD) OF FOREIGN REL. LAW § 203 (AM. LAW INST. 1987).

102. S.C. Res. 2056 (Jul. 5, 2012); S.C. Res. 2071 (Oct. 12, 2012); S.C. Res. 2085 (Dec. 20, 2012).

103. Fabius, *supra* note 98.

104. S.C. Res. 2100 (Apr. 25, 2013).

escape the slaughter.¹⁰⁵ In response, military personnel deployed from Australia, Belgium, Canada, France, Germany, Italy, Luxembourg, Netherlands, Portugal, Spain, Turkey, and the United Kingdom to ensure their security and encourage them to descend from the mountains where the oncoming winter conditions would imperil them.¹⁰⁶ The coalition coordinated with Iraqi military personnel regarding their activities on Iraqi territory, but did not operate with Iraq's consent.¹⁰⁷ On the contrary, the Iraqi representative negotiating with U.S. military commanders "protested the entry of coalition forces into Iraq."¹⁰⁸ Subsequently, Iraqi forces were forced to leave a security zone adjacent to the Turkish border, and a no-fly zone was established in northern Iraq above the 36th parallel to provide continuing protection. In 1992, the United States established a similar no-fly zone in southern Iraq to protect the so-called marsh Arabs.¹⁰⁹

Initial statements from President Bush suggested the operation was a humanitarian action taken under Security Council Resolution 688.¹¹⁰ The plain language of the resolution, however, provided no authority for the use of force in northern Iraq. Rather, it merely "demand[ed]" that Iraq end its repression and "insist[ed]" that Iraq allow immediate access by the international humanitarian organizations to all those in need of assistance."¹¹¹

On March 24, 1999, NATO launched Operation Allied Force to prevent the ethnic cleansing of the minority Albanian population in the province of Kosovo by the predominately Serbian forces of the Federal Republic of Yugoslavia (FRY).¹¹² From March 24 to June 9, NATO flew over 38,000 sorties, roughly a third of which were attack missions.¹¹³ Although the threat of a Russian veto precluded Security Council action, NATO's Secretary General stated, "[w]e must stop the violence and bring an end to the humanitarian catastrophe now

105. See generally GORDON W. RUDD, HUMANITARIAN INTERVENTION: ASSISTING THE IRAQI KURDS IN OPERATION PROVIDE COMFORT, 1991 (2004).

106. *Id.* at 226.

107. At the meeting between the senior U.S. military commander and the Iraqi emissary, the U.S. general "explained the coalition's objective of creating a security zone for the Kurds and then issued a vigorous demarche stressing that coalition forces would cross the Iraqi border and enter Zakho the next day At the same time, the State Department had sent another message to Iraqi diplomats, explaining the demarche and warning them not to interfere." *Id.* at 114.

108. *Id.* at 115.

109. Donald Rumsfeld, Sec'y of Def., Briefing (Sept. 30, 2002), <http://transcripts.cnn.com/TRANSCRIPTS/0209/30/se.05.html>.

110. George Bush, President, Remarks on Assistance for Iraqi Refugees and a News Conference (Apr. 16, 1991), <http://www.presidency.ucsb.edu/ws/?pid=19479>. (This action was "made necessary by the terrible human tragedy unfolding in and around Iraq" and is "[c]onsistent with United Nations Security Council Resolution 688").

111. S.C. Res. 688 (Apr. 5, 1991).

112. RAND CORPORATION, OPERATION ALLIED FORCE: LESSONS FOR FUTURE COALITION OPERATIONS (2001), http://www.rand.org/pubs/research_briefs/RB72/index1.html.

113. Capt. Gregory Ball, 1999 - Operation Allied Force, AIR FORCE HISTORICAL SUPPORT DIVISION (Aug. 23, 2012), <http://www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458957/operation-allied-force/>.

taking place in Kosovo. We have a moral duty to do so.”¹¹⁴ At the time, NATO consisted of nineteen member States. Since NATO operates by consensus, the operation had to be approved by all 19 NATO nations.¹¹⁵

The day before the air campaign was launched, President Clinton characterized the situation as a “genocide in the heart of Europe,”¹¹⁶ and, recalling the lessons of Bosnia, noted “if you don’t stand up to brutality and the killing of innocent people, you invite the people who do it to do more of it. We learned that firmness can save lives and stop armies.”¹¹⁷ The United Kingdom was more explicit, urging that “force can be justified on the grounds of overwhelming humanitarian necessity without a UNSCR.”¹¹⁸

Both the Iraq and Kosovo cases involved extended military operations conducted by multiple countries, most of which are generally viewed as committed to the international rule of law. Although there was neither consent nor Security Council approval in the two cases, participating States employed force based on dire humanitarian need. Unless one concludes that the States involved willingly violated international law, they are strong indications that a customary norm permitting intervention has been in the process of surfacing. Indeed, a recent statement from the United Kingdom Minister of State notes that the United Kingdom has invoked the doctrine of humanitarian intervention on three occasions: protecting the Kurds in northern Iraq, no fly zones in north and south of Iraq, and the use of force in Kosovo.¹¹⁹

Finally, when substantial humanitarian crises occur, States are often subjected to criticism for failure to intervene. The most glaring failure in this regard is the Rwandan genocide of 1994. Over the course of a mere 100 days, approximately 800,000 Rwandans were butchered.¹²⁰ The failure of the international community to intervene was widely condemned, including in a harsh internal UN review.¹²¹ Further, the International Commission on Intervention and State Sovereignty crafted its Responsibility to Protect concept as a means to avoid “more Rwandas.”¹²² Similarly, commentators and civil society organizations

114. Press Release, Javier Solana, NATO Secretary General (Mar. 24, 1999), <http://nato.int/docu/pr/1999/p99-041e.htm>.

115. NATO, NATO HANDBOOK 15 (2006), <http://www.nato.int/docu/handbook/2006/hb-en-2006.pdf>.

116. William J. Clinton, President of the United States, Remarks at the Legislative Convention of the American Federation of State, County and Municipal Employees (Mar. 23, 1999), <http://www.presidency.ucsb.edu/ws/?pid=57294>.

117. *Id.*

118. UK FOREIGN & COMMONWEALTH OFFICE, FRY/KOSOVO: THE WAY AHEAD; UK VIEW ON THE LEGAL BASE FOR USE OF FORCE (1998), *quoted in* Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 *Survival* 102, 106 (1999).

119. Robertson Letter, *supra* note 79, at 3.

120. *Rwandan Genocide: 100 Days of Slaughter*, BBC NEWS (Apr. 7, 2014), <http://www.bbc.com/news/world-africa-26875506>.

121. Rep. of the Indep. Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, U.N. Doc. S/1999/1257 (1999).

122. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT at VIII (2001).

widely criticized the slow and inadequate response to the humanitarian crisis in Darfur, Sudan, that began in 2003.¹²³

Considering, *inter alia*, the evidence set forth above, it is becoming increasingly difficult to deny that, if it has not already crystallized as some suggest, a right of humanitarian intervention is emerging. States clearly find it legitimate to intervene in cases of severe humanitarian crisis, even if a corresponding legal right does not definitively exist. Repeated actions based on legitimacy are fertile ground for the growth of new customary norms. The fact that the U.S. missile strikes were justified based on the humanitarian imperative of deterring repeated use of a horrendous weapon provides support in the form of State practice for the crystallization of a right of humanitarian intervention.

Much of the apprehension about the emergence of humanitarian intervention as a basis for the use of force concerns potential abuse by States.¹²⁴ To address that risk, commentators endorsing humanitarian intervention have proffered preconditions that should be met before force is used to stop humanitarian suffering in other countries.¹²⁵ However, the best indicators of the conditions under which humanitarian interventions are likely to be judged lawful are the legal justifications put forth by States that engage in them and general expressions *opinio juris*.

In this regard, the United Kingdom has articulated a test of cumulative factors that must be met before a humanitarian intervention is lawful. By that test, such operations may only be mounted when action is blocked in the Security Council,

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it [is] objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force [is] necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).¹²⁶

In contrast, the United States has not acknowledged humanitarian intervention as a ground for the use of force. Still, policy statements made in the aftermath of Iraq, Kosovo, and Syria suggest the U.S. approach to undertaking

123. See, e.g., Michael Clough, *Darfur: Whose Responsibility to Protect?*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/wr2k5/darfur/darfur.pdf>.

124. See generally Goodman, *supra* note 4.

125. See generally, Ashley Deeks, *Commentary: Multi-Part Tests in the Jus ad Bellum*, 53 Hous. L. Rev. 1035 (2016) (discussing multi-part tests from Harold Koh, the United Kingdom, the Independent International Commission on Kosovo, the Danish Institute of International Affairs, and the International Commission on International Affairs, citations omitted).

126. P.M. Office Statement, *supra* note 77; Robertson Letter, *supra* note 79.

humanitarian military action is generally consistent with the UK position. It is also remarkably unchanged over nearly two decades.

Consider the 1991 incursion into northern Iraq. While the stated U.S. justification was enforcement of UN Security Council Resolution 688, in various statements President Bush justified the operation on the basis that it was (1) a short-term measure designed to address humanitarian concerns;¹²⁷ (2) in response to a significant humanitarian crisis;¹²⁸ (3) which had the potential to destabilize the region;¹²⁹ (4) and was taken with broad coalition support.¹³⁰ Similarly, following the 1999 intervention in the Federal Republic of Yugoslavia, Michael Matheson, the Acting Legal Advisor for the Department of State, noted that there was a pressing “danger of humanitarian disaster” and pointed to the “inability of the [Security] Council to make a clear decision adequate to deal with that disaster.”¹³¹ He also highlighted the potential for regional destabilization, the significant multilateral support, and Yugoslavia’s violation of “obligations under international humanitarian agreements.”¹³² According to Matheson, the use of force by NATO forces was proportionate and limited in duration.¹³³ In the Syria case, the “Basis for Using Force” document cited earlier mentions the existence of “severe humanitarian distress,” “widespread violations” of international legal obligations, and potential for regional destabilization, and argues that the use of force was necessary and proportionate to the aim of preventing further Syrian use of chemical weapons.

To summarize, the United Kingdom and United States appear to accept the following criteria for intervention. First, a certain quantum of harm must manifest. The United Kingdom uses the term “extreme humanitarian distress,”¹³⁴ while the United States variously refers to “humanitarian disaster,”¹³⁵

127. Bush, *supra* note 110 (“And I want to stress that this new effort, despite its scale and scope, is not intended as a permanent solution to the plight of the Iraqi Kurds. To the contrary, it is an interim measure designed to meet an immediate, penetrating humanitarian need.”).

128. *Id.* (U.S. intervention in Iraq was “made necessary by the terrible human tragedy unfolding in and around Iraq as a result of Saddam Hussein’s brutal treatment of Iraqi citizens.”) See also George Bush, President, Statement on Aid to Iraqi Refugees (Apr. 5, 1991), <http://www.presidency.ucsb.edu/ws/?pid=19441>, (“The human tragedy unfolding in and around Iraq demands immediate action on a massive scale.”).

129. *Id.* (“At stake are not only the lives of hundreds of thousands of innocent men, women, and children but the peace and security of the Gulf.”).

130. Bush, *supra* note 110 (“It is for this reason that this afternoon, following consultations with Prime Minister Major, President Mitterrand, President Ozal of Turkey, Chancellor Kohl this morning, U.N. Secretary-General Perez de Cuellar, I’m announcing a greatly expanded and more ambitious relief effort.”).

131. Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC’Y INT’L L. 301, 301 (2000).

132. *Id.*

133. *Id.*

134. P.M. Office Statement, *supra* note 77.

135. Matheson, *supra* note 131, at 301.

“terrible human tragedy,”¹³⁶ and “severe humanitarian distress.”¹³⁷ Second, the situation must be one with regard to which the Security Council cannot or will not act. Third, the use of force has to be necessary, proportionate, and limited to alleviating human suffering. Finally, there appears to be a clear preference for some degree of international consensus on the need for action, and, at least by the U.S. view, a preference for multilateral action.

Assuming for the sake of analysis that a right of humanitarian intervention exists, there would seem to be no question that the scale of the human suffering in Syria merits such an operation. The conflict has resulted in at least 450,000 dead,¹³⁸ more than four-and-a-half-million refugees,¹³⁹ and six-and-a-half-million internally displaced Syrians.¹⁴⁰ There have been countless war crimes, including direct attacks on civilians, multiple uses of chemical weapons, and indiscriminate artillery bombardments, as well as the use of weaponry that poses particular risks to the civilian population, such as cluster munitions, barrel bombs, and fuel-air bombs.¹⁴¹ The situation is both horrific and ongoing, with no end to the suffering in sight.

However, the missile strikes were not a direct response to the overall suffering, but instead only to Syria’s use of chemical weapons. The suffering caused by the Syrian chemical weapons attack is significantly less than that of any other example cited above. Additionally, the U.S. missile strikes cannot reasonably have been believed to deter any abuses other than the use of the outlawed weapons. Thus, even though the strikes might strengthen the general case for humanitarian intervention, they do not appear to qualify as lawful humanitarian intervention, for they fail to satisfy the quantum of harm criterion.

CONCLUSION: SUBTLE SHIFT IN APPROACH?

It appears certain that many States now view humanitarian intervention as legitimate in extreme circumstances, if not also lawful. As noted, the fact that the U.S. missile strikes were justified in part based on the humanitarian suffering caused by the Syrian use of chemical weapons reinforces the argument for

136. Bush, *supra* note 110.

137. Basis for Using Force, *supra* note 24.

138. Priyanka Boghani, *A Staggering New Death Toll for Syria’s War—470,000*, PBS FRONTLINE (Feb. 11, 2016), <http://www.pbs.org/wgbh/frontline/article/a-staggering-new-death-toll-for-syrias-war-470000/>.

139. *Syrian Arab Republic*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, <http://www.unocha.org/syria>.

140. *Id.*

141. U.N. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep., U.N. Doc. A/HCR/S-17/2/Add.1 (2011); U.N. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep., U.N. Doc. A/HRC/19/69 (2012); U.N. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep., U.N. Doc. A/HRC/21/50 (2012); U.N. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep., U.N. Doc. A/HRC/22/59 (2013); U.N. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep., U.N. Doc. A/HRC/23/58 (2013).

the existence of such a right. Despite the failure to satisfy the quantum of harm criterion, in our view, the episode may signal a subtle shift in State attitudes towards humanitarian intervention.

The determinative factor, in this case, was not the scale of the suffering, but rather that the attendant suffering resulted from the use of a long-demonized unlawful weapon that has unspeakable human effects. This conclusion suggests that the *nature* of harm should be considered as a factor to consider vis-a-vis humanitarian intervention in addition to, or perhaps even in lieu of, the *quantum* of harm, at least when there is a risk of recurrence. It is not without note, in this regard, that a number of States have publically expressed support for the missile strike, including the United Kingdom, Australia, Canada, Israel, Japan, Spain, Italy, Saudi Arabia, Jordan, and Turkey.¹⁴² Furthermore, France and Germany issued a joint statement implicitly supporting the U.S. action,¹⁴³ and senior officials at the EU and NATO have spoken approvingly of the operation.¹⁴⁴ It is inconceivable that these States and international organizations missed the fact that the chemical weapons attack resulted in a quantum of suffering that, had other means been used, would have provoked not a whisper of humanitarian intervention.

To the extent a humanitarian intervention norm exists or is in the process of emerging, States are plainly according “value” to the nature of the harm they are seeking to mitigate. Indeed, it was the first use of chemical weapons, not the fact that the suffering had reached a particular level, that inspired the United Kingdom’s willingness to embrace humanitarian intervention in Syria. One has to wonder whether a similar reaction would attend situations involving other particularly onerous weaponry that has long been outlawed, such as biological, radiological, or poisonous weapons.

This possibility of a shift in approach to the purported right of humanitarian intervention is not unprecedented. By its nature, customary international law evolves in accordance with the conduct of States combined with *opinio juris*. This evolutionary dynamic of crystallization is often driven by States acting in ways that are not contemplated by existing law and, indeed, sometimes contrary to that law. What we may be witnessing, then, is the slow and somewhat painful birth of a nascent right in customary international law allowing States to act forcefully to put an end to the use of particularly repugnant weaponry against a civilian population, or perhaps even one countenancing forceful State responses to other egregious forms of terrorizing and massacring civilian populations in other countries. If, however, this commendable norm of international law is ever to fully crystallize, States must have the moral courage to set forth their legal basis for use of force in the form of explicit expressions of *opinio juris*. Their failure to do so, among other things, leaves the world less safe.

142. Aisch et al., *supra* note 8.

143. *Id.*

144. Arthur Beesley and James Politi, *EU and NATO Welcome US Strike on Syria*, FIN. TIMES (Apr. 7, 2017).
